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No. 903 (30)

Supreme Court of the United States.

OCTOBER TERM, 1943.

GEORGE LAWLEY & SON CORPORATION,
Defendant, Appellant,

v.

CHARLES J. SOUTH,
Plaintiff, Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

PAUL B. SARGENT,
Attorney for Petitioner.

Of Counsel:
Varnum Taylor,
Wm. Gardner Perrin.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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CHARLES J. SOUTH,
Plaintiff, Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Your petitioner, George Lawley & Son Corporation, respectfully submits the following petition for a writ of certiorari and prays that the same may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit which was entered February 4, 1944, affirming a judgment of the District Court of the United States for the District of Massachusetts.

Statement.

The original suit was brought by the plaintiff appellee, Charles J. South, in the District Court of the United States for the District of Massachusetts. The case was tried before Ford, J., and a jury, and judgment was entered for

the plaintiff appellee on a special verdict. Your petitioner appealed to the United States Circuit Court of Appeals for the First Circuit, which on February 4, 1944, affirmed the lower court's judgment by a split decision.

The plaintiff's action was founded on the so-called Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, 29 U.S.C. secs. 201-219, hereinafter referred to as "the Act."

The facts of the case, so far as they are applicable to the present petition, are set forth adequately in the opinion of the Circuit Court of Appeals, which opinion is printed in the Record, pp. 235 to 245, and is incorporated herein by reference. In order not to overextend the petition, it will suffice to say here that the plaintiff appellee sought to recover overtime wages at time and a half his regular salary for a period commencing with the inception of the Act, namely, October 24, 1938, and ending with the date he was asked to resign as treasurer of the defendant appellant, October 27, 1941.

Statutes and Regulations under Consideration.

The statute under which the plaintiff sought to recover is the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, 29 U.S.C. secs. 209-219, and the regulations thereunder, which are found in title 29, c. 5, Code of Federal Regulations, part 541. The pertinent provisions of the statute and the regulations will be found in the appendix on pages 18-28 and are incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925, c. 229, sec. 1; 43 Stat. 938; 28 U.S.C. sec. 347. Judgment of the Circuit Court of Appeals for the First Circuit was entered February 4, 1944.

Questions Presented for Consideration.

The questions presented for consideration are: Was the Circuit Court of Appeals in error—

(1) In holding that the plaintiff appellee was not estopped from claiming overtime in whole or in part;

(2) In holding that the plaintiff appellee was not a *bona fide* executive or administrative official;

(3) In holding that the Administrator's regulations issued by authority of the Act, particularly with reference to section 541.1 (F), should not be construed to mean what the grammatical construction thereof would indicate;

(4) In holding that the Act itself "must be applied literally according to its words" (R. p. 242), but that the regulations interpreting the Act must not be applied literally according to their grammatical construction, because the Circuit Court of Appeals does "not think that the Administrator could have meant exactly what he said" (R. p. 243);

(5) In failing to consider and pass upon the following points of law set forth in the defendant appellant's brief on its appeal to the Circuit Court of Appeals:

(*a*) The verdict of the jury was in such a form that no monetary damages could be legally awarded to the plaintiff appellee; and

(*b*) Judgment should not have been entered for the plaintiff appellee in the sum of $6866.11;

(6) In affirming the judgment for the plaintiff of the District Court for the District of Massachusetts?

Reasons Relied upon for Allowance of Writ of Certiorari.

(1) The problems inherent in this case involve an important question of Federal law which has not been and should be settled by this Court, namely, the interpretation of the Act and its validity.

(2) The Circuit Court of Appeals has decided a question of interpretation of language used in statutes and regulations contrary to the decisions of local and Federal legal rules of interpretation, namely, that if words and phrases and sentences are clear and unambiguous, they must be construed to mean what they grammatically say.

(3) The decision of the Circuit Court of Appeals sanctions an act by the District Court which departs from the accepted and usual course of judicial proceedings in that the Circuit Court of Appeals permitted a monetary judgment to be entered for the plaintiff appellee based upon an uncertain and indefinite special verdict of the jury.

(4) Although the decision of the Circuit Court of Appeals is not in conflict with decisions of any other Circuit Courts of Appeals which are known to the petitioner, it is in conflict with decisions of District Courts of the United States (see *Mortenson* v. *Western Light & Telegraph Co.*, 42 Fed. Supp. 319) and in conflict with a decision of the Supreme Court of Kansas, rendered in the case of *Gale* v. *Fruehauf Trailer Co.*, Kansas Supreme Court No. 35,963, January 22, 1944, and therefore the opinion in the present case should be reviewed by this Court for the purpose of establishing a uniform rule of law for the guidance of other Circuit Courts of Appeals and Federal District Courts and State Supreme Courts.

Prayer for Writ.

It is therefore respectfully requested that this petition be granted and that a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit issue.

Respectfully submitted,

PAUL B. SARGENT,
Counsel for the Petitioner.

Of Counsel:
VARNUM TAYLOR,
WM. GARDNER PERRIN.